Before the
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
Commonwealth of Massachusetts

CRC COMMUNICATIONS LLC, D/B/A OTELCO, *Complainant*, v. MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID, AND VERIZON NEW ENGLAND INC. *Respondents*.	File No. DTC 22-4

REPLY TO RESPONSES OF NATIONAL GRID, VERIZON, AND THE DPU TO OTELCO MOTION FOR ENFORCEMENT OF FINAL ORDER IN DTC 22-4

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TABLE OF CONTENTS

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CRC COMMUNICATIONS LLC, D/B/A OTELCO, replies to the Response of Massachusetts Electric Company d/b/a National Grid ("National Grid") to Motion of CRC Communications LLC d/b/a OTELCO and the Opposition of Verizon New England Inc. d/b/a Verizon Massachusetts ("Verizon") (collectively "Pole Owners") to Motion for Enforcement of the Final Order and the Department of Public Utilities ("DPU") (jointly "Respondents") Comments on Post Order Motion, filed in the referenced matter on April 4, 2023 as follows:

I. INTRODUCTION

The genesis of this case is the adamant and false claim of each Pole Owner that it does not *ever* allow boxing. That claim was and is categorically false. OTELCO expended hundreds of thousands of dollars, and considerable time, proving through the Department's complaint process that Verizon routinely boxes poles jointly owned with National Grid, and disproving the Pole

Owners' generalized claims that boxing is unsafe, impairs network reliability, or increases the Pole Owners' overall costs. The Department agreed with OTELCO on these points, and also recognized the public interest in ensuring "nondiscriminatory access to poles . . . with rates, terms and conditions that are just and reasonable." Order at 20 (citing G.L. c. 166, § 25A; 220 C.M.R. § 45.01).

The Pole Owners now claim they cannot evaluate OTLECO's boxing requests unless and until both Pole Owners independently re-survey each of the poles OTELCO seeks to box, as well the adjacent poles. This claim is also categorically false. The attached O-Calc Pro Analysis Reports ("O-Calc Reports"), performed by National Grid's outside engineering firm, Osmose, in connection with Grid's original pre-construction surveys, include all of the information needed to assess OTELCO's boxing requests using the Pole Owners' cited criteria, to wit, whether a pole has side-taps, is a corner pole, is on an embankment or is already boxed, as well as significant additional information.[1]

In addition to having these comprehensive, four page reports for each of the poles impacted by OTELCO's boxing requests, the Pole Owners are, or should be, aware of any modifications to these poles made after these reports were generated that would impact OTELCO's boxing requests (just as Grid should know which poles require bucket trucks), as Dr. Lawrence Slavin declared under oath. The Pole Owners' unsworn argument (they offered no supporting declarations) that they lack knowledge of what has happened since the original surveys were filed is utter nonsense

[1] As set forth in OTELCO's accompanying motion, OTELCO only recently obtained these reports directly from Osmose to address the Pole Owners' unverified claims asserted in their Responses that such information did not exist. It is unclear why National Grid has not itself made these Reports available to the Department or OTELCO. However, given National Grid's assertion that "information OTELCO would receive from Osmose would not be of particular assistance to OTELCO since it would not capture all relevant data. . ." National Grid appears to at least be aware of these Reports. If so, National Grid's insistence that such information is of no use, is yet another falsehood designed to prevent OTELCO from gaining nondiscriminatory access to poles it jointly owns with Verizon.

and, may not be relied on as truth. Moreover, any actual changes in field conditions are unlikely to impact boxing decisions, but those that do can be addressed by OTELCO supervised qualified contractors applying the Pole Owners' boxing criteria, as Mr. Allen has testified.

Rather than fully address the Motion's substantive arguments, or respond at all to Dr. Slavin's and Mr. Allen's supporting sworn declarations, the Pole Owners, and even the DPU, attack the Motion on procedural grounds, claiming the sole vehicle to challenge a party's failure to abide by an Order after 20 days has expired, is a new complaint. As set forth herein, these arguments also lack merit. Applicable procedural rules do not prevent entities from filing motions to enforce final orders, or prevent the Department from acting on such motions. National Grid's and Verizon's tactics are not surprising, given their ongoing efforts to exclude photographic evidence of boxed poles on purely procedural grounds. They also provide little justification for their failure to abide by the Order requirements to consider boxing requests on a non-discriminatory basis, pursuant to just and reasonable rates, terms and conditions. Taken as a whole, the Pole Owners' behavior and argument make clear that they feel they are, and should remain, unaccountable and unregulated.

OTLECO's Motion is the proper vehicle to challenge the Pole Owners refusal to comply with the Order. OTELCO requests that the Department grant its Motion for Enforcement of the Final Order and its requested relief.

II. ARGUMENT

A. Motion to Enforce Compliance with Order is Procedurally Proper

As a threshold matter, OTELCO's Motion for Enforcement of the DTC Final Order in 22-4 ("Motion") does not seek to relitigate the Order's findings. The Motion requests the Department

require the Pole Owners to fully comply with the Order, as it stands, and OTELCO's requested relief is designed to ensure their compliance.[2]

1. 207 C.M.R. § 1.04(5)(a) Permits Motions Requesting "Any Action" After the Initial Pleading

In challenging OTLECO's Motion to Enforce on procedural grounds, the Pole Owners, and the DPU, argue incorrectly that if motion is not brought within 20 days of a final order, the Department may not address a party's failure to comply with the order unless a new complaint is filed. This construction is impractical, unreasonable and contrary to the procedural rules' plain language.

Pursuant to 207 C.M.R. § 1.04(5)(a), "[a]n application to the Department to take *any action or to enter any order after initial pleading*. . . shall be by motion which. . . shall set forth the action or order sought." Notably, this rule allows filing anytime "after the initial pleading," and does not prohibit any specific request or remedy. It is, contrary to National Grid's assertions, a "catch all" provision that expands the scope of general motions to allow the Department to address a myriad of issues under its general regulatory authority.

National Grid would artificially limit this rule, claiming it only "refers to motions made before a hearing, during a hearing, and to address requests for protection from public disclosure," and does not allow for motions made after issuance of a final order. Grid Resp. at 7. Verizon similarly argues, without citation to any authority, that OTELCO's motion "is far too late to be considered in this docket." Verizon Opp. at 6. Both are wrong. The plain language of the rule places no such limitations on "general motions" covered by subsection (a). National Grid's

[2] National Grid's arguments that a Motion to Enforce undermines the orderly adjudication of complaints and the finality of agency decisions are misplaced. Grid Resp. at 8. Likewise, Verizon's repeated arguments that OTELCO seeks to relitigate issues and failed to file a motion for reconsideration or an appeal are equally off-point. Verizon Opp. at 1, 6, and 14. Neither Pole Owner cites a single sentence in OTELCO's Motion challenging a finding of the Order. OTELCO's Motion requests the Department ensure compliance with the Order, as it stands.

reliance upon the titles of subsections (c) and (d) of the rule is misplaced since these subsections do not reference or limit subsection (a) of the rule on filing general motions.[3]

Notably, the DPU rejected a similar argument made by National Grid in a 2011 order. There, in response to a party's motion to re-open a hearing after the final order had issued, National Grid similarly argued that such motions could not be entertained *after issuance of a final order*. Specifically, Grid argued "that because 220 C.M.R. § 1.11(8) allows the Department to reopen a hearing on its own motion 'at any time prior to the rendering of a decision,' this implies that, if the Department cannot reopen a hearing after issuance of a final decision, no party may reopen a hearing after issuance of a final decision."[4] The DPU rejected National Grid's limited interpretation, finding it had "the inherent authority to reopen a proceeding after a final decision has been rendered."[5]

Indeed, the Department may, on its own motion, open a proceeding to investigate a party's compliance with an order, which it has done on a number of occasions, including at the later behest of a party to the original proceeding. For example, after "certain intervention petitioners alleged that BECo had failed to comply with the Department's Order" in a prior docket (well after 20 days had passed), the Department of Telecommunications and Energy ("DTE") opened an investigation into, and confirmed, BECo's non-compliance.[6] The DTE did so despite "a lack of express

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[3] Furthermore, the procedural rule regarding the reopening of hearings – which necessarily occurs *after* the hearing has closed, - specifically requires that such motion shall be filed in accordance with 207 C.M.R. § 1.04(5). *See* 207 C.M.R. § 1.10(8). This clearly belies National Grid's assertion that 1.04(5) does not permit motions after a hearing has closed.

[4] *Petition of Massachusetts Electric Company and Nantucket Electric Company, each d/b/a National Grid, for approval by the Department of Public Utilities of two long-term contracts to purchase wind power and renewable energy certificates, pursuant to St. 2008, c. 169, § 83 and 220 C.M.R. § 17.00 et seq*., 2001 Mass PUC LEXIS 69 *16 (DPU 2001).

[5] *Id.* at *25.

[6] Investigation by the Department of Telecommunications and Energy, on its own motion, into Boston Edison Company's compliance with the Department's Order in D.P.U. 93-37, 2001 Mass. PUC LEXIS 69.

legislative grant of enforcement means," ruling that it was "nonetheless obligated to take corrective measures to ensure that BECo returns to compliance with both § 17A and the terms of the settlement approved in [the final order in] D.P.U. 93-37." [7] The same is true here. The Department is duty bound to ensure that the Pole Owners comply with the Order, including incorporated governing law.

Moreover, OTELCO could not have raised its concerns to the Department within 20 days of the Final Order, as it had no reason to suspect that the Pole Owners would refuse to abide by the Order's requirements. National Grid first communicated its intent to require entirely new surveys of every pole on OTELCO's application before providing itemized invoices on November 15 (35 days after the Order issued). Motion at 6. Verizon stated its intent to require entirely new surveys for poles OTELCO sought to box and adjacent poles on the parties' November 30 call (50 days after the Order issued). *Id*. at 7. All three parties continued to discuss the necessity of additional surveys in December and through January of this year. *Id*. at 8-12. OTELCO promptly filed the Motion in February.

Even if the Pole Owners were correct, and the Order could also be read (albeit in a vacuum) to allow them each to resurvey the poles OTELCO seeks to box as well as adjacent poles, for the same reasons set forth in OTELCO's Motion for Leave to File Its Reply and Supporting Evidentiary Documents, being filed simultaneously with this Reply, good cause exists to waive the 20 day requirement, and to consider and reject that interpretation.[8] As explained there, the O-

[7] *Id.* at *132.

[8] Despite the Pole Owners' and DPU's limited reading of Department's procedural rules, there are circumstances which allow for the late filing of motions, including motions for clarification and reconsideration, upon a showing of good cause. *See, e.g.,* Joint Petition of Electric Distribution Companies for Approval of model SMART Provision pursuant to An Act Relative to Solar Energy, St. 2016, c.75, § 11, and 225 C.M.R § 20.00 to implement the Solar Massachusetts Renewable Target Program, 2019 Mass. PUC LEXIS *9-10 (DPU finding that clarification was necessary and that "good cause exists to waive the 20-day filing requirement").

Calc Reports recently made available to OTELCO directly by Osmose, generated at the time of National Grid's original surveys, and the Verizon National Grid joint reconciliation process, confirm that the information needed to assess OTELCO's boxing requests has been available all along. It is unclear why National Grid did not make these reports available to the Department or OTELCO before now, but they are directly relevant to the issues in dispute and must be considered.

OTELCO is entitled to file, and the Department is authorized to consider, a motion requesting "any action or to enter any order after initial pleading," and thus, OTELCO's Motion for Enforcement is procedurally proper.

2. A New Complaint Proceeding Would Unjustly and Needlessly Subject OTELCO to Additional Costs and Delays

Respondents correctly state that OTELCO could have chosen to file a new complaint based on the Pole Owners' refusal to abide by the Order.[9] They fail to recognize, however, that *requiring* OTELCO to do so in this case, would be judicially inefficient, and would unjustly delay OTELCO's competitive broadband deployment and expose OTELCO to significant unnecessary additional costs. Indeed, OTELCO's deployment of competitive broadband services already has been delayed by over a year due to the Pole Owners' false claims that they never use or allow boxing. Now they seek to further delay OTELCO by insisting the only method for addressing their conduct is a new complaint proceeding, despite the fact that the procedural rules are not so limited. Justice delayed – is justice denied. And each further delay allows Verizon to further exploit its significant competitive advantage over OTLECO.

[9] Verizon attempts to dismiss OTELCO's allegations regarding the Pole Owners conduct following issuance of the Final Order because OTELCO did not raise these new allegations in its Complaint. Verizon Opp. at 13, 16. As should be evident, OTELCO could not assert claims regarding the Pole Owners' refusal to comply with the Final Order in its Original Complaint because OTELCO is not psychic. Nonetheless, those claims are an entirely proper basis to request the Department to compel the Pole Owners to abide by the Final Order.

Additionally, the Respondents' arguments fail to recognize that nearly all orders require more than 20 days to implement. As such, a party seeking to benefit from an order would nearly *always* have to file a new complaint to achieve the result it obtained in the first proceeding. Even then, the noncompliant party could, once again, ignore the new final order requirements, requiring the filing of another complaint seeking enforcement of the second order. And so on. This argument leads to the absurd result that a party could simply ignore final orders, repeatedly. OTELCO's Motion to Enforce is the proper, and easily the most judicially efficient (the docket remains open), method to seek to require the Pole Owners to honor the Order mandates now, not after another six month complaint process. Or another six months. And so on.

B. The Final Order Mandates Non-Discriminatory Access to Poles on Just and Reasonable Terms Including for Boxing Requests

The Order expressly incorporates the Pole Owners' obligation – in assessing boxing requests -- to provide non-discriminatory access upon just and reasonable rates, terms and conditions. Namely, the Order states that "if the pole owners have specific safety, reliability, or engineering issues regarding a specific pole, they can deny OTELCO's request to box that pole, and that denial would be reasonable. **220 C.M.R. § 45.07**." Order at 21 (emphasis added). The cited rule, in turn, codifies the Department's authority to overturn pole owner actions that are ***discriminatory, unjust or unreasonable***. The Order also expressly recognizes the public interest in ensuring "nondiscriminatory access to poles . . . with rates, terms and conditions that are just and reasonable." Order at 20. Accordingly, the Pole Owners may not, consistent with the Order, impose discriminatory, unjust or unreasonable terms and conditions in assessing OTELCO's boxing requests.

1. Additional Survey Requirement is Unjust and Unreasonable

Despite the Pole Owners' unsworn claims to the contrary, they already have access to all of the information needed to evaluate OTELCO's boxing requests, without conducting additional surveys.

National Grid's Response states its original surveys "did not collect or assess information related to side taps, guy-wire support, embankments, corner poles or other such detailed information that would enable the Company to make after-the-fact determinations on boxing." Grid Resp. at 12. Once again, National Grid's statement is **categorically untrue**. Provided as Confidential Exhibit 1 at this secured Drop Box link are the O-Calc Reports generated by National Grid's contractor, Osmose, which OTECLO secured directly from OSMOSE on April 14, 2023. *See* Declaration of Debbie Brill-Poulin in Support of Motion for Leave at ¶9, attached hereto as Attachment 1 ("Brill-Poulin Dec."). The several page O-Calc Reports, which are designed to provide all of the information needed to assess the load capacity of each pole on an application, do in fact include the information cited by National Grid above. *See* Declaration of Lawrence M. Slavin, Ph.D. at ¶¶ 6-8, attached hereto as Attachment 2 ("Slavin Dec.').

Verizon similarly claims it requires new surveys to ascertain whether the pole has side taps, is a corner pole, is on an embankment, or whether "other conditions" exist that require consideration. Verizon Opp. at 9. In fact, all of this information should be available from the separate set of surveys previously conducted by Verizon's contractor and paid for by Otelco for every pole in its applications – including those identified as needing replacement and adjacent. If not, Verizon should have been made aware of these O-Calc Reports in the extensive joint reconciliation process it engages in with National Grid.[10] The question remains, moreover,

[10] See Complaint at ¶24 (explaining the applications are submitted to Osmose through the National Grid portal, after which Osmose provides its analysis to National Grid, after which Grid and Verizon jointly evaluate their survey

whether Verizon should even be allowed to require this information in the first place, given the numerous examples provided by OTELCO to the Department in this processing showing that Verizon has boxed poles that would not be permitted using its own criteria.

Despite their claims that the existing surveys are "outdated," neither Pole Owner addresses the fact that their application and make ready process, as a matter of course, is fraught with delays that leave gaps of time between the survey and construction of the attachments far greater than those at issue here. *See* Motion at Section III.A.2. They also ignore the fact that, taking their argument to its logical conclusion, every pole on every application would need to be resurveyed whenever the pole owners fail to timely complete their work. The irony of this argument is that the Pole Owners routinely take as long as they want to processes applications and perform make-ready work. Here, they seek to use their inefficient process to justify the need for additional surveys and delay the attachment process even longer. This is especially egregious, as the Pole Owners caused the delays in the first place by falsely stating they never use or allow boxing.

The Pole Owners also fail to meaningfully respond to Dr. Slavin's sworn declaration in support of the Motion stating that, as pole owners, National Grid and Verizon should be well aware of any new attachments, or poles that require bucket trucks. *See* Motion, Declaration of Lawrence M. Slavin, Ph.D., ¶17 (Feb. 21, 2023). Verizon concedes that it maintains records of the individual projects it has performed on its network or has licensed. Verizon Opp. at 12. National Grid's pole attachment agreement requires attachers to notify it of any modifications they make, and enforces this obligation through penalties. Complaint Ex. 3 at section 3.1. Any "other changes" would presumably be unauthorized and few and far between and should not exist at all on the poles on

information); Verizon Direct Testimony in DTC 22-4 filed Aug. 1, 2022 at 10 ("The pole owners have already surveyed the poles, **reconciled those surveys** and determined what work is needed to prepare the poles to accommodate OTELCO's attachments.") (emphasis added).

which OTELCO has requested boxing – *i.e*., those poles determined by Verizon to lack space for new attachments and to require replacement. Indeed, the Pole Owner responses fail to identify a single change to a single pole on a single OTELCO application.[11] Not one. Rather, they rely on the unsworn suppositions of counsel to support their conjecture, failing to explain how older surveys may be used when *they* fail to perform make-ready timely, and claiming (unconvincingly) they are unaware of relevant changes to their Poles. The Pole Owners have all that is reasonably necessary to evaluate OTELCO's boxing requests. Their insistence that another round of surveys, at OTLECO's considerable expense, is unjust and unreasonable, and not supported by the Order.[12]

2. Additional Survey Requirement is Discriminatory

Verizon, despite its earlier claims to the contrary, indisputably boxes poles when it sees fit, and without engaging in extensive engineering surveys with (or without) National Grid. Likewise, National Grid claims its policy is to never allow boxing, but does not dispute that Verizon has boxed its poles, presumably without National Grid having required pre-construction engineering surveys. Nevertheless, Verizon and National Grid refuse to provide OTELCO the same non-discriminatory access to their poles that they enjoy, in direct contravention of the Department's Order to evaluate OTELCO's boxing requests ***on a nondiscriminatory basis***.

Any requirement to conduct new surveys, and any standard employed by the Pole Owners must apply equally to any party requesting to box poles, including Verizon. It is unjust,

[11] To the contrary, Verizon notes that, to date, no other applicant has requested to box poles. Verizon Opp. at 5, FN 1. Because the poles OTELCO requested to box lacked space on the street side, and, according to Verizon, no other attacher has requested to box poles (attach to the opposite side), Verizon's statement further confirms that there should be no new attachers on the relevant poles (unless they were replaced by the new attacher – which would obviate the need to box them).

[12] The main issues in dispute are, contrary to Grid's claims, not limited to whether Grid and Verizon can require new surveys at OTELCO's expense. OTELCO also urges the Department to consider whether the Pole Owners should prioritize the work and complete it in a reasonable timeframe similar to that afforded Verizon in making boxing decisions– particularly given their misrepresentations to OTELCO – as proven in the case below – that they never allow boxing or use boxing themselves, and the mandate to treat OTELCO in a nondiscriminatory manner.

unreasonable and discriminatory to force OTELCO to pay for redundant, unnecessary surveys or to require OTELCO to abide by standards the Pole Owners do not. And, it would be unjust and discriminatory to begin requiring surveys of Verizon prospectively, simply to apply them to OTELCO now.

In addition to requiring wholly redundant surveys, the Pole Owners would apply "standards" that are vague and susceptible to discriminatory application. There is no evidence in the record that Verizon applies these criteria to its own decisions to box or conducts additional surveys of poles collecting the information it claims is required. [13] In the glaring absence of any evidence, or even explanation, regarding the Pole Owners' use of boxing, OTELCO must be granted the same access, unfettered by additional, unreasonable and unnecessary conditions. Indeed, the FCC, to whom the Department has looked for guidance in applying the same non-discriminatory access obligation, has stated access criteria "must be reasonable in nature in order to be considered nondiscriminatory."[14]

The Pole Owners' only substantive response regarding this issue is their assertion that the Department should reject OTELCO's "new argument that National Grid and Verizon must develop a 'definitive list of objective standards' for review of OTELCO's boxing requests." Grid Resp. at 13. Despite arguments to the contrary, it is not only possible to set forth definitive standards that guide boxing decisions and provide attachers notice of how boxing claims will be evaluated, it is required to ensure non-discriminatory access. Failure to provide any standard, or a vague standard,

[13] Verizon mischaracterizes and dismisses OTLECO's arguments that the boxing standards must be objective, identifiable, and applied be in a nondiscriminatory manner, calling it "pure speculation." Verizon then states that "Verizon MA has not yet actually applied those standards to any request to box a pole." Verizon Opp. at 14-15. That is precisely the point.

[14] Implementation of Section 224 of the Act A National Broadband Plan for Our Future, Report and Order, 26 FCC Rcd 5240 ¶ 76 (2011).

opens the door to (and all but guarantees) discriminatory application – allowing pole owners to freely box where they choose, while denying attachers that privilege. As the FCC has explained, a utility may limit the circumstances in which a particular technique can be used so long as its standards are "**clear**, **objective**, and **applied equally** to both the utility and the attaching entity."[15] Even Verizon made an effort to identify new boxing criteria in response to the Order, perhaps recognizing the Order implicitly requires the Pole Owners adhere to a uniform standard in evaluating boxing requests. That said, a nonexclusive list of "standards" that Verizon does not hold itself to does not demonstrate compliance with the Final Order.[16]

There are many ways to ensure that OTECLO employs boxing safely and without jeopardizing reliability. Indeed, many regulators have deemed it safe for an attacher to perform surveys and engineering using a qualified or approved contractor, thereby avoiding delays and cost increases resulting from unnecessarily redundant and complicated processes.[17] Such an approach is more than appropriate here, where extensive data exists to apply reasonable objective criteria for assessing boxing.

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[15] *See Implementation of Section 224 of the Act, WC Docket No. 07-245, A National Broadband Plan for our Future, GN Docket No. 09-51, Order and Further Notice Proposed Rulemaking 2010 Order*, 25 FCC Rcd 11864, 11870, ¶ 11 (2010) (emphasis added).

[16] Indeed, only after OTELCO filed its complaint did Verizon divulge for the first time its own internal considerations for boxing – yet it still refused to allow OTELCO the same privilege. Given this recent discriminatory conduct, it is unduly optimistic to expect Verizon to apply its newly promulgated, and still vague, "standards" in a nondiscriminatory manner.

[17] *See, e.g., Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd. 7705 (2018) at ¶2 (adopting a "one-touch" process allowing the attacher to "prepare the pole quickly by performing all of the work itself, rather than spreading the work across multiple parties" and "to reduce the likelihood of coordination failures that cause unwarranted delay."47 C.F.R. §§ 1.1411(j) and 1.1412; N.H. RSA 374:34-a, III-V (adopting 47 CFR § 1.1411(j)).

3. Verizon and National Grid Failed to Provide Sworn Testimony Supporting Any Argument

Verizon and National Grid fail to support their blanket assertions with sworn declarations. Instead they expect the Department to accept their unsupported assertions as truth, including claims that they do not have sufficient information to evaluate boxing without conducting new surveys. However, the Department rules provide "unsworn statements appearing in the record shall not be considered as evidence on which a decision may be based." 220 C.M.R. 1.10. Moreover, there is no reason to accept these assertions here, given the Pole Owners' untruthful assertions necessitating OTECLO's Complaint, to wit, that they do not use or allow boxing, and the more recent revelation that the O-Calc Reports available to both Pole Owners all along definitively include the information the Pole Owners state is necessary to assess OTELCO's boxing requests. In fact, rather than explaining its own use of boxing captured by OTELCO's exhibits, Verizon claims it was OTELCO's responsibility to investigate and move into the record every example of Verizon boxing a pole in Massachusetts before the record closed. Verizon Opp. at 15. Verizon again rests on procedural technicalities to prevent the Department from addressing its unjust, discriminatory conduct and false statements. But, the Pole Owners should have disclosed Verizon's use of boxing in response to the Department's and OTELCO's data requests. *See*, *e.g.*, DTC-VZ 1-22 (requesting "five examples of poles in Massachusetts on which Verizon employs boxing of its own attachments"); DTC-VZ-1-29 (requesting "the percentage of Verizon-owned or jointly owned poles covered by OTELCO's applications which are currently boxed"); OTELCO-VZ 1-3 (asking Verizon to identify boxed poles); DTC-NG 1-5, DTC-NG 1-6, and OTELCO-NG-3. Instead, the Pole Owners continue to cling to the conclusively disproved claim that they do not allow boxing. Accordingly, the Pole Owners' unsworn statements may not be

relied upon to disprove the sworn statements submitted by OTELCO regarding any factual matter at issue.

C. Verizon and National Grid's Interpretation of the Order is Unreasonably Narrow and Fundamentally Flawed

1. The Order Cannot be Read in Isolation of the Regulatory Framework for Pole Attachments

As stated, the Order expressly incorporates the requirements of non-discriminatory access to poles upon just and reasonable rates, terms and conditions. Despite these clear directives, the Pole Owners attempt to limit the scope of the Order, and fail to consider the Order's findings in the context of the long-standing nondiscriminatory and reasonableness requirements.

2. National Grid's Reliance on Finding that Pole Owners May "Revisit" Poles to Justify Unnecessary Re-surveys is Flawed

National Grid self-servingly interprets two Order statements to justify conducting entirely new surveys of the poles impacted by OTELCO's boxing requests, all at OTELCO's expense. First, National Grid relies upon the Order's statement that the Pole Owners may "revisit" the poles where they improperly denied boxing so that they could assess boxing using non-discriminatory, just and reasonable criteria (Grid Resp at 10); and, second, National Grid seizes upon language addressing claims relating to increased costs potentially caused by boxing – such as higher costs of replacing poles – to place all of the cost responsibility on OTELCO (*id.*).

Verizon similarly treats the Order as blanket authority to allow it to conduct new surveys solely to gather information already in its possession and now clearly available in the O-Calc Reports. Verizon justifies its conduct by stating "[n]othing in the Order . . . prohibits supplemental surveys or finds that they would not be appropriate in the present circumstances." Verizon Opp. at 1-2. Doing so ignores the broader context of these isolated statements, *i.e.*, boxing requests must be considered on a non-discriminatory basis, pursuant to just and reasonable terms and

conditions. Conducting unnecessary surveys that needlessly subject an attacher to exorbitant costs and additional delays is discriminatory, unjust and unreasonable, and thus prohibited by the Order.

While the Order states that, "[t]the Department will afford the pole owners the opportunity to revisit these poles" it does so in the specific context of providing the Pole Owners "an opportunity to satisfy the Final Order's provisions" to provide specific reasoning as to why poles 2,3,4 and 10 cannot be boxed. Final Order at 21-22. Even if this statement is taken more broadly, it must be interpreted consistently with existing legal requirements that all access must be on just and reasonable terms and conditions. To wit, "revisiting" need not be conducting entirely redundant surveys where existing survey data, in the form of extensive O-Calc Reports, may be "revisited" to assess the boxing requests. It is wholly unreasonable to allow Pole Owners to increase costs and delay deployments to require additional preconstruction surveys without a legitimate need to do so, particularly given the Pole Owners' failure to offer proof of a single change to any poles at issue. Similarly, while OTELCO stands by its commitment to reimburse the Pole Owners for the reasonable costs attributable to boxing the pole, it does not agree that this statement justifies shifting the cost of unnecessary, redundant re-surveys to OTELCO. OTELCO already paid hundreds of thousands of dollars to each pole owner to independently survey the poles.

In short, no part of the Order should be read to relieve the Pole Owners of their obligations to permit non-discriminatory access on just and reasonable terms and conditions.

3. Verizon Fails to Acknowledge the Order's Cardinal Finding that Denial of Boxing Requests Must Be Reasonable

The Final Order makes abundantly clear that a pole owner's denial of a boxing request is not reasonable unless it articulates the specific safety, reliability, or engineering issues regarding a specific pole that would prevent boxing. Final Order at 21. The Order further affirms it is in the

public interest and otherwise consistent with Massachusetts pole attachment law and policy, and that a pole owner must provide sufficient, specific reasoning, which amounts to more than a general preference for pole replacement, general claims of additional network burden, or claims of additional financial burden, in denying boxing requests. *Id.*

Verizon goes to great lengths to avoid acknowledging these paramount directives, stating that "[t]he only relief of any kind that the Order granted on the Complaint with respect to Verizon MA was the finding that the Pole Owners had not offered sufficient grounds to deny OTELCO's boxing request to box four specific poles." Verizon Opp. at 6-7 and 12. Verizon further asserts that the Department did not address the procedure that should apply to future requests to box poles, and "nothing in the Order directs Pole Owners 'to complete make-ready in a reasonable time frame.'" *Id.* at 16-17. In short, Verizon does not agree that it is bound by the non-discriminatory, just and reasonable access requirements clearly cited in the Final Order. Order at 21 citing 220 C.M.R. § 45.07.

Despite Verizon's protestations, the Final Order does address the procedure that should apply to future requests to access poles by boxing – it must be nondiscriminatory, just and reasonable. Verizon's efforts to evade this standard, and to minimize the effect of the Final Order with regard to boxing requests, plainly illustrate OTELCO's difficulties in persuading the Pole Owners to reasonably and fairly review their boxing requests.

D. National Grid's Refusal to Provide OTELO with Requested Cost Breakdowns is Indefensible

National Grid justifies its refusal to provide detailed, itemized cost estimates using the existing surveys, by claiming that pole conditions *may* have changed and labor costs must be updated. This excuse lacks merit. As noted in Section II.B.1, the Pole Owners routinely take this long to process applications and complete make-ready work. As such, following National Grid's

argument to its logical conclusion, National Grid could routinely require new surveys if they take too long to process applications. The fact of the matter is, National Grid is fully capable of providing the requested cost breakdowns without the need for additional surveys, they are simply choosing not to do so.

III. CONCLUSION

For the foregoing reasons, OTELCO requests its Motion to Enforce the Final Order, and its requested relief be GRANTED.

Respectfully submitted,

CRC Communications LLC d/b/a OTELCO

By its Attorneys:

/s/ Maria T. Browne
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Date submitted: April 18, 2023

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2023, I caused a copy of the foregoing OTELCO'S Reply to National Grid's and Verizon's Oppositions to Motion to Enforce Order and to DPU Comments served via electronic mail, in accordance with the requirements of 220 C.M.R. § 1.05(1) on the following:

National Grid
Attn: Joy Banks
Manager, Third Party Attachments
40 Sylvan Road
Waltham, MA 02451
Joy.banks@nationalgrid.com
Tel.: 617-949-6134

National Grid
Attn: Commercial Legal
Legal Department
40 Sylvan Road
Waltham, MA 02451

Verizon New England, Inc.
Manager – License Administration Group
6 Bowdoin Sq Floor 6
Boston, Massachusetts 02114
Attention: Terrence Toland
Title: Agreement Manager
Tel.: 978-372-4018
Terrence.Toland@one.verizon.com

/s/ Maria T. Browne
Maria T. Browne

Attachment 1

Before the
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
Commonwealth of Massachusetts

CRC COMMUNICATIONS LLC, D/B/A OTELCO, *Complainant*, v. MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID, AND VERIZON NEW ENGLAND INC. *Respondents.*	File No. DTC- 22-4

DECLARATION OF DEBBIE BRILL-POULIN

I, Debbie Brill-Poulin, declare as follows:

1. My name is Debbie Brill-Poulin. OSP Licensing Manager at Otelco, Inc., parent company of CRC Communications LLC ("OTELCO"). I have 17 years of experience in performing work required by this position. In my role as Licensing Manager, I assist in the submission OTELCO's pole attachment applications and I deal directly with both National Grid and Verizon MA representatives and their outside contractors who complete preconstruction surveys for OTELCO's applications.

2. I make this Declaration in support of OTELCO's Motion for Leave to File its Reply and Supporting Evidentiary Material ("Motion for Leave") and OTELCO's Reply to Responses of National Grid, Verizon and the DPU to OTELCO's Motion for Enforcement of Final Order in DTC 22-4 filed contemporaneously herewith in the above-captioned case. I know the following of my own personal knowledge, and if called as a witness in this action, I could and would testify competently to these facts under oath.

3. In this Declaration I address the following issues: 1) why OTELCO only recently requested National Grid's outside engineering firm, Osmose, to provide OTELCO the O-Calc Pro Analysis Reports ("O-Calc Reports") generated by OTELCO as part of National Grid's preconstruction survey requirements; and, 2) the date that OTELCO received the O-Calc Reports.

National Grid and Verizon MA's Demand for New Preconstruction Surveys Focused on Surveys Being "Outdated" Rather than "Incomplete"

4. As explained by David Allen, following the entry of the Final Order on October 11, 2022, myself and other OTELCO representatives exchanged emails and participated in phone calls with the Pole Owners to discuss OTELCO's pending boxing requests in light of the directives provided by the Department of Telecommunications and Cable ("DTC") in its Final Order. Declaration of David Allen, filed February 21, 2023, in support of OTELCO Motion to Enforce Final Order in DTC 22-4 at ¶ 4.

5. In the course of discussions, representatives of both National Grid and Verizon ("Pole Owners") stated that, in order to determine whether specific poles are suitable for boxing, OTELCO would need to cancel and resubmit the affected applications, at which time each Owner would have to resurvey the impacted poles, at OTELCO's expense. Initially, National Grid representative Joy Banks stated that National Grid must reconsider make-ready estimates due solely to the passage of time. I believe Verizon also argued that the surveys were "outdated" and that the new surveys would need to take into account completed make-ready work. I do not recall either Pole Owner stating that additional information would need to be collected to evaluate boxing requests – only that the existing surveys were "outdated" and therefore could not be relied upon.

6. For this reason, at that time, OTELCO had no reason to question whether the surveys had captured all information necessary to evaluate OTELCO's boxing requests. To the contrary, it has consistently been OTELCO's position that the surveys did collect all necessary information, and the Pole Owners refusal to utilize the existing surveys for this information is unreasonable because of the regular delays experienced (which demonstrate that the survey data is not so "outdated" that it is unreliable) and that *if* any changes had occurred due to the passage of time – the Pole Owners should be aware of such changes.

Both National Grid's and Verizon's Replies to OTELCO's Motion to Enforce Claim the Existing Surveys Did Not Collect All Relevant Information

7. The Pole Owners' responses to OTELCO's Motion to Enforce make very clear that the Pole Owners are both arguing that information regarding side-taps, corner poles, embankments, the extent to which poles already were boxed, and the like, was never collected in the original surveys. Because the claim that the information collected in the original surveys is factual information that was not provided in a signed and sworn declaration, but simply argued in the Pole Owner responses, OTELCO determined that we should attempt to verify this information if we could. To that end, I contacted Osmose directly and requested that it provide OTELCO any O-Calc analysis of the poles it had surveyed for National Grid in connection with OTELCO's original pole attachment applications.

8. OTELCO did not request this specific information previously for two reasons: 1) the primary basis for not using the survey information up until the Responses were filed was the passage of time; OTELCO did not believe there was a question regarding the fact that the Osmose surveys had the necessary information to evaluate boxing requests; and,

2) our past experience in requesting information directly from Osmose regarding the cost breakdowns for make-ready estimates was met with an immediate and negative response from National Grid, and a refusal to provide the requested data. This information only became clearly relevant in light of the Pole Owners' replies to OTELCO's Motion to Enforce wherein they plainly state the existing surveys do not contain information regarding certain criteria used to evaluate boxing requests.

OTELCO's Request for O-Calc Reports

9. On Friday April 14, 2023, Osmose provided OTELCO the O-Calc Reports generated for the poles included in OTELCO's applications for pole attachments permits in Northampton, Massachusetts. The O-Calc Reports, attached to OTELCO's Reply as Confidential Attachment 1, are true and correct copies of the O-Calc Reports I received directly from Osmose. At that time, I requested Osmose to provide the O-Calc Reports generation for poles included on OTELCO's applications for Belchertown and Palmer over the next week or so.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

By: Debbie Brill-Poulin

Dated: April 18, 2023

BENJAMIN T. MADDEN
Notary Public - Maine
My Commission Expires
October 25, 2026

Attachment 2

Before the
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
Commonwealth of Massachusetts

CRC COMMUNICATIONS LLC, D/B/A OTELCO, *Complainant*, v. MASSACHUSETTS ELECTRIC COMPANY D/B/A NATIONAL GRID, AND VERIZON NEW ENGLAND INC. *Respondents*.	File No. DTC- 22-4

DECLARATION OF LAWRENCE M. SLAVIN, Ph.D.

I, Lawrence M. Slavin, declare as follows:

1. My name is Dr. Lawrence M. Slavin. I am principal and co-owner of Outside Plant Consulting Services, Inc., a private practice specializing in standards, guidelines and construction practices for outside plant facilities in the telecommunications and power industries. My address is 15 Lenape Avenue, Rockaway, New Jersey, 07866.

2. I received a B.S. in Mechanical Engineering from The Cooper Union for the Advancement of Science and Art. I then pursued an M.S. in Engineering Mechanics at New York University, where I also received my Ph.D. in Mechanical Engineering. My professional background includes a wide range of consulting experiences in various roles in the telecommunications and power industries. In addition to my other interests and activities, I represent the national telephone industry, via the Alliance for Telecommunications Industry Solutions, on the National Electrical Safety Code (NESC) Committee. I actively participate on various NESC subcommittees, including the relevant

Subcommittee 4 (Overhead Lines – Clearances) and Subcommittee 5 (Overhead Lines – Strength & Loading), as well as on Subcommittee 7 (Underground Lines), Interpretations Subcommittee, Executive Subcommittee and Main Committee. I also serve on Accredited Standards Committee 05, responsible for several utility standards, including *ANSI O5.1, Wood Poles, Specifications and Dimensions*. I am also a past and present contributor to the frequently referenced, widely used and respected Telcordia *Blue Book – Manual of Construction Procedures*. More details regarding my background are attached to my declaration as Attachment A.

3. My participation in these organizations is directly relevant to the present dispute between OTELCO and both National Grid and Verizon ("Pole Owners").

4. I previously provided pre-filed testimony in this docket at the request of OTELCO. Among other things, my testimony addressed the practice of pole "boxing," or "opposite side" construction (typically the rear side of the pole, facing away from the road), as it relates to efficient construction techniques for overhead communication lines and compliance with appropriate safety codes and industry practices, and how the ability to use this method, as opposed to the installation of a new, larger pole, will increase the feasibility of providing broadband services to the public. My testimony also addressed Verizon's and National Grid's claims that boxing creates safety issues and complicates the completion of future work, and I discussed the benefits of boxing to both pole owners and other attachers, as well as any possible drawbacks.

5. I also previously submitted a Declaration in support of OTELCO's Motion for Enforcement of the Final Order in DTC 22-4 on February 21, 2023.

6. OTELCO has now requested that I address the O-Calc Pro Analysis Reports ("O-Calc Reports"), performed by National Grid's outside engineering firm, Osmose, in connection with National Grid's original surveys of the poles on OTELCO's applications, which are included with OTELCO's Motion for Leave to File Reply and Supporting Evidentiary Documents, as Confidential Attachment 1. As Ms. Brill-Poulin explains in her declaration, OTELCO obtained the O-Calc Reports for the poles in North Hampton directly from Osmose on April 14, 2023, and she expects to get additional O-Calc Reports for the poles in Belchertown and Palmer later this week.

7. I have reviewed a subset of the O-Calc Reports provided to OTELCO. These several-page reports include extensive information about each surveyed pole including the information necessary to assess the existing load on the pole and its capacity to tolerate additional load. Based on my review, the information needed to assess OTELCO's boxing requests using the Pole Owners' cited criteria -- including whether a pole has side-taps, is a corner pole, has other attachments (e.g., street lights), is on a steep embankment or is already boxed, as well as significant additional information -- is included in these comprehensive reports.

8. With this information, and the information already available to the pole owners as I describe in my February 21, 2023 Declaration, there is no need for Verizon and National Grid to redo their surveys to consider OTELCO's boxing requests. In the rare instance where conditions have changed in the field in a manner that impacts OTELCO's request, a qualified contractor acting under OTELCO's supervision, in coordination with make-ready performed by the pole owner and/or other attachers, as appropriate, would be

capable of applying objective criteria and perform boxing without creating a safety problem, or compromising reliability.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

By: 
Dr. Lawrence M. Slavin

Dated: April 18, 2023